



U.S. Department of Justice

Environment and Natural Resources Division

DG:DAJ

90-6-2-63C

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MAR 17 2003

March 14, 2003

Department of Water Resources

via FedEx Mail

Diana R. Delaney, Chief Deputy Clerk
Snake River Basin Adjudication
DISTRICT COURT
253 Third Ave., North
Twin Falls, Idaho 83303-2707

Re: SRBA Case No. 39576
Subcase Nos. 65-11412 and 65-11412A

Dear Ms. Delaney:

Enclosed for filing is the following original documents in the above mentioned subcases:

1. **UNITED STATES' RESPONSE TO EMMETT IRRIGATION DISTRICT'S
MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN
SUPPORT**
2. **AFFIDAVIT OF STEVEN JARSKY**
3. **AFFIDAVIT OF RUTH PAGE**

Thank you for your time and attention in this matter.

Sincerely,

David A. Jarvis
Paralegal

Enclosure

Certificate of Service

I certify that on this 14th day of March 2003, I caused to be served true and correct copies of the listed documents to the parties identified below.

1. **UNITED STATES' RESPONSE TO EMMETT IRRIGATION DISTRICT'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT**
2. **AFFIDAVIT OF STEVEN JARSKY**
3. **AFFIDAVIT OF RUTH PAGE**

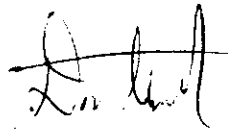
via FedEx Delivery:

CLERK OF THE SRBA COURT (Original)
SRBA Courthouse
District Court
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Twin Falls, Idaho 83301

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United States' Response to Emmett Irrigation District's Motion for Summary Judgment and Memorandum in Support

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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Subcase Nos. 65-11412 and 65-11412A
	)	
Case No. 39576	)	UNITED STATES' RESPONSE TO
	)	EMMETT IRRIGATION DISTRICT'S
	)	MOTION FOR SUMMARY JUDGMENT
	)	AND MEMORANDUM IN SUPPORT
_____	)	

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Introduction

This is the United States' Response to the Emmett Irrigation District's ("EID's") ***Motion for Summary Judgment and Memorandum in Support***. The United States' opening brief demonstrated that (1) the United States acting through the Bureau of Reclamation ("Reclamation") is the beneficial user of the water that powers the hydro-pumps, and (2) that the water right is appurtenant to the hydro-pumps.^{1/} ***Memorandum in Support of the United States' Motion for Summary Judgment*** ("U.S. Opening Brief"). EID argues just the opposite, that (1) EID should be considered the beneficial user of the water right used to operate the hydro-pumps at Black Canyon Dam because the hydro-pumps are used to deliver irrigation water to EID; and (2) the hydro-pump water rights must be considered appurtenant to the land irrigated by EID's members.

This memorandum will demonstrate that nothing in EID's memorandum contravenes the United States' arguments. Specifically, the United States will reaffirm that powering the hydro-pumps is, in and of itself, a beneficial use; and thus the United States has appropriated the water used to power the hydro-pumps. Further the United States will show that the water right at issue in this case is appurtenant to the hydro-pumps rather than the lands owned by EID's members. In short, the United States will prove that it has met the requirements for perfecting a water right under state law and accordingly the water right at issue in this case must be decreed to the United States.

^{1/} The United States also argued that EID is estopped by its decades of silence on its purported ownership interest in the hydro-pump water rights.

Argument

I. THE EMMETT IRRIGATION DISTRICT HAS NO CLAIM TO THE WATER USED BY THE UNITED STATES TO OPERATE THE HYDRO-PUMPS AT BLACK CANYON DAM.

EID argues that the ownership of the water rights at issue in this case must be determined as a matter of state law. *Memorandum in Support of Emmett Irrigation District's Motion for Summary Judgment* ("EID Opening Brief") at 19 (quoting *California v. United States*, 438 U.S. 645 (1978)). The United States is not relying on federal law here. Indeed, state law requires this Court to hold that (1) Reclamation is the beneficial user of this water right; and (2) the water right is appurtenant to the hydro-pumps upon which it is used, rather than the lands of the Emmett Irrigation District.

A. Reclamation is the beneficial user of the water.

In its opening brief, the United States established that it has appropriated the water used to operate the hydro-pumps by diverting water from the Payette River and applying it to the beneficial use of generating power. U.S. Opening Brief at 15-16. EID argues that because Reclamation has a contractual obligation to use that power to pump water from the Black Canyon Dam to EID's North Side Canal, Reclamation should be divested of all or part of the water right it has appropriated. Reclamation's contractual obligations, however, do not transform EID into the beneficial user of the water used to power the pumps.²

² If anything, Reclamation's contractual obligations only reiterate that the United States is the beneficial user of the water. The contracts between the United States and EID require the United States to deliver irrigation water to EID's North Side Canal by means of the hydro-pumps. Absent a water right to power the pumps, the United States would not be able to fulfill its contractual obligations. Therefore there is no question that the water right enures to the benefit of the United States.

EID's argument to the contrary is based upon a fundamentally flawed premise.

EID argues that "irrigation entities are the beneficial owners of water rights diverted for irrigation within the entities boundaries." EID Brief at 19. However, the water at issue here is diverted to generate power rather than for irrigation purposes. Moreover, the water is used by the United States, to power the United States' hydro-pumps and returned to the river without ever reaching the lands of the Emmett Irrigation District.

Idaho law recognizes the value of using water for power generation and protects the right to use water for that purpose. Power is specifically identified as a beneficial use in Idaho's constitution. Id. Const. art. XV, § 3. In addition, the Idaho Supreme Court has long held that diverting water for the purpose of producing power is a beneficial use. *See, e.g., Union Grain & Elevator Co. v. McCammon Ditch Co.*, 41 Idaho 216, 240 P. 443, 444 (1925) (holding water had been appropriated where "waters of the river were actually diverted and applied to the beneficial use of producing power for the operation of the mill"). Moreover, the beneficial use of "power" is not limited to electrical power. Rather, as *Union Grain* demonstrates, it extends to using water to power machinery. *See Id.* at 443. That the power generated is later used to pump water to irrigate the fields of EID does not diminish the fact that Reclamation has applied the water to a beneficial use and in so doing completed an appropriation. Once Reclamation diverted water and applied it to the beneficial use of generating power for the hydro-pumps, the United States established a water right. *Id.* at 444.

EID's argument is in effect that the contracts between EID and the United States serve to transfer some interest in that water right to EID. It has long been recognized that a water right is a form of property interest, if not a full property right. *Hard v. Boise City Irrigation &*

Land Co., 9 Idaho 589, 76 P. 331 (1904)(appropriation of water and application to beneficial use creates a property interest which can be transferred); *cf.* I.C. § 42-101 (2002) (a water right “shall not be considered as being a property right in itself”). The contracts cannot have transferred the United States’ property interest in the water to EID because only Congress has the authority to dispose of the property of the United States. U.S. Const. art. IV, § 3, cl. 2; *Breen v. Housing Authority of City of Pittsburgh*, 119 F.Supp. 320 (W.D. Pa. 1954).

Moreover, as is shown below, the contracts neither purport to transfer an interest in the United States’ water right to EID nor recognize that EID has any interest in the water right the United States established through beneficial use of water to operate the hydro-pumps.

B. The contracts are consistent with the United States’ ownership of the water rights used to operate the hydro-pumps.

In its opening brief the United States demonstrated that the water rights at issue in this case are appurtenant to the hydro-pumps. U.S. Opening Brief at 18-19. *See also* Section C of this Argument, *infra*. Article 12(a) of the 1955 Contract states that all appurtenances to Black Canyon Dam and the reserved works are owned by the United States. Thus the contracts recognize that the United States owns the hydro-pump water rights; the only question left is EID’s assertion that it has some beneficial interest in those rights amounting to a property right.^{3/} Below, the United States shows that nothing in the contracts recognize such a right in EID.

i. The 1921 Contract

EID argues that the language of the contracts between the United States and EID

^{3/} The November 18, 1921, June 30, 1932, and October 4, 1955 Contracts between the Bureau of Reclamation and Emmett Irrigation District are attached to the U.S. Opening Brief at Exhibit 5, Exhibit 20, and Exhibit 22, respectively.

suggest that the water to power the hydro-pumps was never intended to be owned by Reclamation. EID cites language in Article 32 of the 1921 Contract which explains that the United States reserved all power rights and privileges “except the power required to pump (during the irrigation season) the necessary water” EID Opening Brief at 8 (quoting Article 32 of the 1921 Contract).

Article 32 of the 1921 Contract says nothing about the water rights used in connection with operation of the hydro-pumps at Black Canyon Dam. Rather the provision recognizes the United States’ discretion over the use of the Dam’s facilities and in particular, its ability to use the Dam to provide irrigation water to the Black Canyon Irrigation District and to generate hydropower.. The “exception” language cited by EID merely recognizes that the contract operates to commit the power generated at the hydro-pump turbines for use in operating the hydro-pumps in fulfillment of the United States’ contractual obligations. Nothing in Article 32 either recognizes that EID has any interest in the hydro-pump water rights or purports to assign any such interest to EID.⁴

ii. The 1932 Contract

EID further argues that the provisions in Article 47 of the 1932 Contract stating “any and all diversions made by the District shall be made out of its own rights to natural flow and stored water without encroaching upon said Government stored water” demonstrates that the water used to operate the hydro-pumps must come from EID’s water rights. EID Opening Brief at 11 (quoting Article 47 of the 1932 Contract). That is not the case. The 1932 Contract

⁴ Like Article 32, Article 22 of the 1921 contract, also cited by EID, merely addresses the use of power generated at the dam. It says nothing about water rights.

was written to enable EID, *inter alia*, to install “an electric pump with a capacity not exceeding fifty (50) second-feet, for the purpose of pumping water from the back water above the said Black Canyon dam into the North Side canal” 1932 Contract at Article 45. Thus, “diversions made by the District ... out of its own rights to natural flow and stored water” refers to the diversions that the District elects to make through its electric pump. In contrast, the water used to operate the hydro-pumps is diverted by Reclamation from the water impounded by Reclamation behind Black Canyon Dam. In no way is the diversion made to power the hydro-pumps a “diversion made by the District.”

That point is confirmed by Article 47 of the 1932 Contract which was written to clarify the extent to which Reclamation would provide water to EID beyond the quantity of water which had been promised EID in the 1921 Contract and which EID would be able to operate its electric pumps to obtain additional water. The 1932 Contract provided that when “six hundred (600) second-feet or more of water in excess of the “Government stored water,”^{5/} was flowing past Black Canyon Dam, Reclamation would provide EID 300 second-feet of water in the North Side Canal, an agreed amount through the South Side Canal diversion works, “and also such additional amount as is provided by means of the construction of the additional works authorized under article 45 of this contract [*i.e.*, the electric pump].” 1932 Contract at Article 47.

When there was less water available, the 1932 contract provided EID with a percentage of the flow above the “government stored water.” *Id.* However, “any and all

^{5/} “Government stored water” is defined in the 1932 Contract as being the stored water from Deadwood Reservoir and “such other reservoirs, if any, as may be hereafter constructed by the United States.” 1932 Contract at Article 47.

diversions *made by the District* shall be made out of its own rights to natural flow and stored water without encroaching upon said Government stored water or the water agreed herein to be allowed to pass over or through said dam.” *Id.* (emphasis added). In other words, Reclamation would divert a percentage of the excess and deliver it to the North Side Canal. In addition, Emmett Irrigation District could supplement the flow into the North Side Canal by means of its electric pump, but it could only divert from natural flow or its own storage rights and could not draw from storage water released to satisfy Governmental contracts with other irrigators.⁹ Thus Article 47 of the 1932 Contract reaffirms that any diversion considered to be “made by the District” was done through the District’s electric pump and not the hydro-pumps.

iii. The 1955 Contract.

Similarly, EID’s argument that the 1955 Contract acknowledges that Emmett Irrigation District is the beneficial owner of the water used to power the hydro-pumps is unavailing. As the United States explained in its opening brief, Article 12(a) demonstrates the parties’ agreement that the United States owns the water rights appurtenant to the hydro-pumps. U.S. Opening Brief at 18. Nevertheless, EID contends that Article 12(b) of the Contract, which allows the United States to “permit such uses of these dams and reservoirs as are not inconsistent with the rights of the District under this contract ...” somehow demonstrates that EID is “at the least, the beneficial owner of the water right” used to operate the hydro-pumps. EID Brief at 13.

Article 12(b) merely allows the United States to permit the use of the dam to other parties, so long as its doing so doesn’t interfere with the United States’ ability to meet its

⁹ The operation of EID’s electric pumps is explained in the Affidavit of Steven Jarsky, filed concurrently with this brief.

contractual obligations to EID.⁷ Thus rather than restricting the United States' interests, Article 12(b) expands them.

EID further relies on Article 13(a) of the 1955 Contract which provides that the water rights held by the United States in connection with the Black Canyon Powerplant "shall at no time be exercised to the detriment of the water rights held for the benefit of the District as provided in this contract." As EID explains, Article 13(a) "specifically relates to hydroelectrical power (as opposed to hydropower). EID Opening Brief at 13. Thus the provision is of limited utility in addressing the hydro-pumps.

Article 13(a) serves a parallel function to that of Article 12(b), in that it acknowledges the United States' ability to take certain actions⁸ so long as doing so does not interfere with the United States' fulfillment of its contractual obligations. Thus article 13(a) recognizes the United States' ownership and operation of the hydroelectric powerplant, but clarifies that the United States cannot operate the powerplant in such a way as to interfere with the delivery of water to EID pursuant to the contract.⁹

The final contractual provision EID relies on is Article 16(a). As EID states, Article 16(a) describes operation of Black Canyon Dam. What it does *not* do is suggest that EID

⁷ As one example, Article 12(b) makes it clear that the United States has the right to use Black Canyon Dam to provide water for the Black Canyon Irrigation District.

⁸ In Article 12(b), permitting use of the dam and related facilities by other parties; in Article 13(a) operating the hydroelectric powerplant.

⁹ As examples, Article 13(a) would prohibit the United States from releasing water stored for EID at Deadwood Reservoir to generate hydropower or transferring water from the operation of the hydro-pumps to the hydroelectric facilities if doing so would prohibit the United States from meeting its irrigation water delivery obligations to EID.

owns the hydro-pump water rights. EID emphasizes the language in Article 16 (a) which provides that “[t]o the extent that any river flow at Black Canyon Dam is being passed downstream from Black Canyon Dam to supply natural flow water rights or irrigation storage rights, that water *shall be available first to operate the direct-connected pumping installation.*” EID Brief at 14 (emphasis in original). Article 16(a) merely represents Reclamation’s agreement that water being passed through the dam will be used to power the hydro-pumps first, rather than being used to operate the hydroelectric generators. Reclamation’s agreement to give precedence to the operation of the hydro-pumps in no way suggests that Reclamation has relinquished the water rights it established through beneficial use of the water at the hydro-pumps.

EID finally argues that it should be the beneficial owner of this power water right because “construction of Black Canyon Dam required the movement of the District’s original point of diversion serving the North Side irrigation canal.” In fact, construction of the dam *did not* require the relocation of the EID diversion works. At least five miles separates the original diversion point from the farthest point of backwater effects from the dam. In addition, the Payette River drops about 80 feet through this stretch. Thus, the original diversion point of Emmett Irrigation District was clearly not endangered by the construction of the Black Canyon Dam. The Montour Farmers Ditch Company operates a diversion just below EID’s old diversion point. See Affidavit of Ruth Page (filed concurrently with this brief) at ¶¶ 6-8. Thus, there is no question EID could have continued to operate its original dam after Black Canyon Dam was constructed. Indeed, EID retained the legal right to do so until 1952, when it finally changed the

point of diversion for its irrigation water rights.¹⁰

C. The water right used to operate the hydro-pumps at Black Canyon Dam is not appurtenant to land within the Emmett Irrigation District.

Emmett Irrigation District cites the 1902 Reclamation Act, Idaho Code, and various court cases for the proposition that the water rights used to operate the hydro-pumps must be appurtenant to the lands within the District. EID's argument, however, is undone by one simple fact: the cases and statutes it relies on refer to water used for irrigation purposes rather than water rights used to generate power. For instance, EID explains that the 1902 Reclamation Act states "[t]he right to the use of water ... shall be appurtenant to the land irrigated." That provision, however, addresses water that is used for irrigation. *See United States v. Humboldt Lovelock Irrigation Light & Power Co.*, 19 F. Supp. 489 (D. Nev. 1937), *rev'd on other grounds by United States v. Humboldt Lovelock Irrigation Light & Power Co.*, 97 F.2d 38 (9th Cir. 1938).

Similarly, *Anderson v. Cummings*, 81 Idaho 327, 340 P.2d 1111 (1959) and *Parke v. Bell*, 97 Idaho 67, 539 P.2d 995 (1975) merely stand for the proposition that water used for irrigation is appurtenant to the land it is applied to. Water used for purposes other than irrigation is not appurtenant to land at all. *KRM, Inc. v. Caviness*, 925 P.2d 9 (NM App. 1996). Idaho law recognizes that water used for purposes other than irrigation is appurtenant to the thing upon which the water is used rather than any parcel of land. I.C. § 42-101 (2002) states "the right to the use of any of the public waters ... shall become the complement of, or one of the appurtenances of, the land or *other thing* to which, through necessity, said water is being applied"

¹⁰ Copies of the documents filed to move the diversion point are attached as Exhibits 37 & 38.

(emphasis added). Thus Idaho law recognizes that the water rights used to operate the hydro-pumps are appurtenant to the thing to which the water is being applied—the hydro-pumps. Indeed the same principal which makes irrigation water appurtenant to land demonstrates that the water rights must be appurtenant to the pumps: absent water to power them the pumps have no value.

As the United States established in its opening brief, Reclamation beneficially applies the water at issue to the turbines of the hydro-pumps, which in turn generate the power to operate the centrifugal pumps that deliver other water pursuant to contract. Generating power is a complete beneficial use in and of itself. *Union Grain*, 240 P. at 444. After the water used to power the hydro-pumps is put to that use, it is discharged to the river.¹¹⁷ The water actually delivered to the north side canal by the United States is water EID has appropriated for irrigation purposes. That irrigation water is appurtenant to the land within the District; the water used to power the hydro-pumps is not.

Conclusion

Contrary to Emmett Irrigation District's argument, the United States, acting through the Bureau of Reclamation, is the beneficial user of water right 65-11412. Since 1926

¹¹⁷ Thus, even if, as EID argues, the water must be appurtenant to some parcel of land, it still would not be appurtenant to the lands of Emmett Irrigation District. I.C. § 42-1402 (2002) states

[i]n allotting the waters of any water system by the district court according to the rights and priorities of those using such waters, such allotment shall be made to the use to which such water is beneficially applied The right confirmed by such decree or allotment shall be appurtenant to and shall become a part of the ***land on which the water is used***

Therefore, the water to power the hydro-pumps would be appurtenant to the land on which the hydro-pumps are situated rather than irrigated lands within EID.

Reclamation has diverted water from the Payette River through facilities owned and operated by the United States, beneficially applied the water to generate power, and in turn used that power to operate hydro-pumps owned by the United States. After the water has been used to generate power, it is discharged to the river. At no time while the water is put to use does it leave the property of the Bureau of Reclamation, and once Reclamation has completed its beneficial use of the water, it is returned to the river.

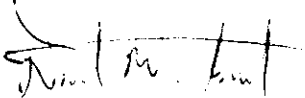
The fact that Reclamation's use of the water brings Reclamation the further benefit of allowing it to meet its contractual obligations to the Emmett Irrigation District is no justification for depriving the United States of any interest in the water right it has lawfully appropriated. Moreover, the contracts between the parties are entirely consistent with the United States ownership of the water rights used to generate power to operate the hydro-pumps.

Finally, because water right 65-11412 is beneficially used to generate the power necessary to enable Reclamation to meet these contractual obligations, the water is appurtenant to the hydro-pumps. The water used to operate the hydro-pumps never reaches the lands of the Emmett Irrigation District and there is no basis to find the water right appurtenant to those lands.

In short, the United States has diverted water, applied it to the beneficial use of generating power and therefore has appropriated it. Accordingly, water right 65-11412 must be decreed to the United States.

Dated this 14th day of March, 2003.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read "David W. Gehlert", written over a horizontal line.

David W. Gehlert
Attorney for the United States

STATE OF IDAHO
DEPARTMENT OF RECLAMATION

In the Matter of the Application of)

The Emmett Irrigation District)
of Emmett, Idaho)

For a change of Point of Diversion in)
Payette River, Gem County, Idaho.)

ORDER GRANTING CHANGE
OF POINT OF DIVERSION

No. 211

WHEREAS, On the 28th day of January, 1950, at the Department of Reclamation of the State of Idaho, at Boise, Idaho, the application of the Emmett Irrigation District, of Emmett, Idaho, for a change of point of diversion from Payette River, came on regularly for hearing, pursuant to published notice, in due and statutory form, and,

WHEREAS, No protest has been filed against the application, and the evidence filed by the applicant, with the application, shows that more economical use of the water will be obtained by such change, and that no other water user will be injured thereby;

NOW, THEREFORE, IT IS HEREBY ORDERED That the said application be, and the same is hereby granted, and that a Certificate of Change of Point of Diversion be issued to the applicant herein, as provided by the laws of the State of Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the official seal of the Department of Reclamation of the State of Idaho to be hereunto affixed, at Boise, Idaho, this 30th day of January, 1952.

Mark R. Kulp
MARK R. KULP
State Reclamation Engineer

S T A T E O F I D A H O

D E P A R T M E N T O F R E C L A M A T I O N

C E R T I F I C A T E O F C H A N G E O F P O I N T O F D I V E R S I O N O F L I C E N S E D W A T E R R I G H T

No. 211

THIS IS TO CERTIFY THAT The EMMETT IRRIGATION DISTRICT, of Emmett, Idaho, is the owner of and using a certain water right for 169,3886 cubic feet per second of the waters of Payette River, with priority of May 26, 1903, said water right being evidenced by License and Certificate of Water Right No. 105, issued by the Department of Reclamation of the State of Idaho, to the Emmett Irrigation District, said License bearing date of December 20, 1913, and being appurtenant to the lands within the boundaries of said Emmett Irrigation District.

That said License and Certificate of Water Right has been entered in the records of the Department of Reclamation of the State of Idaho, in Volume 3 of Licenses, at Page 1318.

And that now, upon the application of The Emmett Irrigation District, of Emmett, Idaho, for Certificate of Change of Point of Diversion for 169,3886 cubic feet per second of water from Payette River, made before the State Reclamation Engineer of the State of Idaho, and said application having been granted, the right to change such point of diversion is HEREBY GRANTED.

That said change of point of diversion shall not modify in effect said water right, or place of use. Said water is to be limited at any given time to an amount actually needed and beneficially used for such purposes, and shall not exceed the following amount, to-wit:

169,3886 cubic feet per second with priority May 26, 1903.

That said water right is appurtenant to the lands above described.

That the water right hereby described has heretofore been diverted from Payette River, with point of diversion 770 feet South, 16 degrees West from the quarter corner between Sections 25 and 30, Township 7 North, Ranges 1 and 2 East, B.M.

That the water right above described will hereafter be diverted from Payette River, with points of diversion located in Lots 1 and 6, Section 28, Township 7 North, Range 1 East, T.M., at the Black Canyon Dam.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the official seal of the Department of Reclamation of the State of Idaho, to be hereunto affixed at Boise, Idaho, this 30th day of January, 1932.

Mark R. Kulp

MARK R. KULP
State Reclamation Engineer

Emmett Irrigation District ✓

to

Public

STATE OF IDAHO }
COUNTY OF GEM }

I hereby certify that this instrument was
filed for record at request of
Karl Mann, Emmett,

at 30 minutes past 11
o'clock A.M., this 9th
day of February 19, 52 in my
office and it is recorded in book 7
of Miscellaneous on

Page 284.

Harold H. Woodman
EX-officio Recorder

Filed 25

Deputy

S T A T E O F I D A H O
D E P A R T M E N T O F R E C L A M A T I O N

In the Matter of the Application of
The Emmett Irrigation District
of Emmett, Idaho
For a change of Point of Diversion in
Payette River, Gem County, Idaho.

ORDER GRANTING CHANGE
OF POINT OF DIVERSION

No. 212

WHEREAS, On the 25th day of January, 1950, at the Department of Reclamation of the State of Idaho, at Boise, Idaho, the application of the Emmett Irrigation District, of Emmett, Idaho, for a change of point of diversion from Payette River, came on regularly for hearing, pursuant to published notice, in due and statutory form, and,

WHEREAS, No protest has been filed against the application, and the evidence filed by the applicant, with the application, shows that more economical use of the water will be obtained by such change, and that no other water user will be injured thereby;

NOW, THEREFORE, IT IS HEREBY ORDERED That the said application be, and the same is hereby granted, and that a Certificate of Change of Point of Diversion be issued to the applicant herein, as provided by the laws of the State of Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the official seal of the Department of Reclamation of the State of Idaho to be hereunto affixed, at Boise, Idaho, this 30th day of January, 1952.

Mark R. Kulp

MARK R. KULP
State Reclamation Engineer

STATE OF IDAHO

DEPARTMENT OF RECLAMATION

CERTIFICATE OF CHANGE OF POINT OF DIVERSION OF LICENSED WATER RIGHT.

No. 212

THIS IS TO CERTIFY That The EMMETT IRRIGATION DISTRICT, of Emmett, Idaho, is the owner of and using a certain water right for 124 cubic feet per second of the waters of Payette River, with priority of July 29, 1908, said water right being evidenced by License and Certificate of Water Right No. 4112, issued by the Department of Reclamation of the State of Idaho, to the Emmett Irrigation District, said License bearing date of May 11, 1940, and being appurtenant to the lands within the boundaries of said Emmett Irrigation District.

That said License and Certificate of Water Right has been entered in the records of the Department of Reclamation of the State of Idaho, in Volume 7 of Licenses, at Page 4020.

And that now, upon the application of The Emmett Irrigation District, of Emmett, Idaho, for Certificate of Change of Point of Diversion of 124 cubic feet per second of water from Payette River, made before the State Reclamation Engineer of the State of Idaho, and said application having been granted, the right to change such point of diversion is HEREBY GRANTED.

That said change of point of diversion shall not modify in effect said water right, or place of use. Said water is to be limited at any given time to an amount actually needed and beneficially used for such purposes, and shall not exceed the following amount, to-wit:

124 cubic feet per second with priority of July 29, 1908.

That said water right is appurtenant to the lands above described.

That the water right hereby described has heretofore been diverted from Payette River, with point of diversion 770 feet South, 16 degrees West from the quarter corner between Sections 25 and 30, Township 7 North, Ranges 1 and 2 East, B.M.

That the water right above described will hereafter be diverted from Payette River, with points of diversion located in Lots 1 and 6, Section 22, Township 7 North, Range 1 West, B.M., at the Black Canyon Dam.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the official seal of the Department of Reclamation of the State of Idaho, to be hereunto affixed at Boise, Idaho, this 30th day of January, 1952.

Mark R. Kulp

MARK R. KULP
State Reclamation Engineer

Emmett Irrigation District

to

Public

STATE OF IDAHO }
COUNTY OF CEM }

I hereby certify that this instrument was
filed for record at request of
Karl Mann, Emmett

51
February 9th

52
February 19th

7
Miscellaneous

285
Ronald Halvorsen
Official Recorder

Febs 1.25

UNITED STATES OF AMERICA

DAVID W. GEHLERT
Trial Attorney, General Litigation Section
Environmental and Natural Resources Division
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(303) 312-7352

Attorney for the United States of America

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA) Subcase Nos. 65-11412 and 65-11412A

Case No. 39576) **AFFIDAVIT OF STEVEN JARSKY**

STATE OF IDAHO)
)ss.
County of Ada)

1. STEVEN JARSKY, being first duly sworn, do depose and state:

1. I am the Operations and Maintenance Technical Services Manager for the western facilities of Snake River Area Office of the Pacific Northwest Region of the Bureau of Reclamation.

2. I make the following statements based on my personal knowledge and I am competent to testify thereto.

3. My educational and professional background consists of a B.S. degree in Electrical Engineering from Cornell University. I have worked as an O&M manager for the Bureau of Reclamation for 19 years.

4. In my position, with the Snake River Area Office of the Bureau of Reclamation, I am the government official that manages, directs, and oversees the operations and maintenance at USBR facilities in southwest Idaho and eastern Oregon.

5. For 19 years, I have managed and directed the operations and maintenance at the Black Canyon facility. My responsibilities include directing the operation and management of the two hydro-pumps located in the Black Canyon powerplant building which are the subject of this litigation.

6. Water can be pumped to the north side canal by one of two means: (1) the two hydro-pumps located in the powerplant building or (2) the four electric pumps located on the north side of Black Canyon Dam. The electric pumps have a total capacity of 72 cfs and are operated and maintained by Emmett Irrigation District (EID) personnel. They are located in a concrete structure that is also maintained by EID. The power for these pumps comes from Reclamation's reserved power system from the Black Canyon station service bus, fed through a fused disconnect in the Black Canyon switchyard.

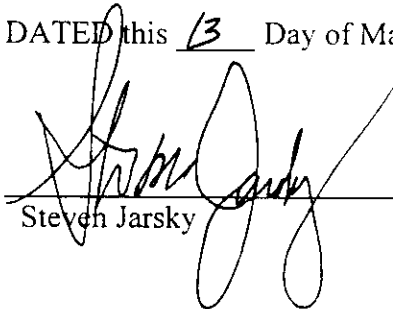
7. The EID Manager calls the Black Canyon Control Center before he starts or stops an electric pump and gives the time for the start/stop. It is logged by the Black Canyon Control Center operator and he/she adjusts the outflow from the dam to compensate for the water taken by the electric pump(s), in order to keep the reservoir level steady. The electric pumps can only be started locally.

8. The electric pumps are utilized to provide supplemental water to the hydro-pumps. When the hydro-pumps are delivering the maximum of which they are capable, and more water is desired by EID, one or more electric pumps are started to supplement the delivery of the hydro-pumps. The combination of pumps used varies with the additional flow

needed. Electric Pump #1 delivers 20 cfs, #2 delivers 25 cfs, #3 delivers 21 cfs, #4 delivers 6 cfs for a total of 72 cfs.

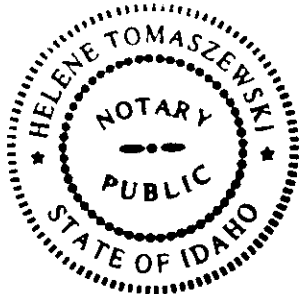
9. On occasion, the electric pumps have also been used when EID desired flows that were less than the minimum output of the hydro-pumps, including early season startup to water-up the canal at a controlled rate. (The absolute minimum output of each hydro-pump is 52 cfs, but the pumps are normally run with an output no less than 70 cfs to improve their operational stability.)

DATED this 13 Day of March, 2003.



Steven Jarsky

SUBSCRIBED AND SWORN to before me this 13th Day of March, 2003.



Notary Public for Idaho _____
Residing at: MERIDIAN
My Commission Expires: 01-16-2008

UNITED STATES OF AMERICA

DAVID W. GEHLERT
Trial Attorney, General Litigation Section
Environmental and Natural Resources Division
U.S. Department of Justice
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(303) 312-7352

Attorney for the United States of America

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	
	)	
	)	Subcase No. 65-11412 and 65-11412A
	)	
Case No. 39576	)	AFFIDAVIT OF RUTH PAGE
_____	)	
STATE OF IDAHO	)	
	) ss.	
County of Ada	)	

I, Ruth Page, being first duly sworn, do depose and state:

1. I make this affidavit based upon personal knowledge, and I am competent to testify thereto.
2. I am employed by the United States Department of Interior, Bureau of Reclamation as a Water Rights Officer.
3. My educational and professional background consists of Bachelor's of Science in Rangeland Resources Management from Oregon State University and a Master of Public Affairs from Boise State University; Thirteen years professional experience as a

Rangeland/Resources Management Officer with both the USDA Forest Service and the Bureau of Reclamation, and 6 years professional experience as a Realty Specialist/Water Rights Officer with the Bureau of Reclamation.

4. I am responsible for water rights coordination for the Bureau of Reclamation throughout the Pacific Northwest Region, including securing, protecting, defending and perfecting Reclamation water rights.

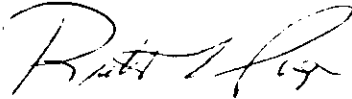
5. As part of my job responsibility, I have been assigned SRBA work in Basin 65 within the Payette Basin. In the litigation of water rights 65-11412 and 65-11412A, my assignment is to assist in accurately describing Bureau of Reclamation and Emmett Irrigation District water rights diverted and facilities at Black Canyon Dam.

6. During the first week of December 2002, I contacted Mr. McConnel of the Montour Farmers Ditch Company to determine the location of the former Emmett Irrigation District diversion dam relative to the Montour diversion point. Mr. McConnel informed me the Emmett Irrigation District dam was on the county line and approximately 1 mile upstream from the Montour diversion point. Montour Farmers Ditch Company continues to divert from their diversion point to this day. Mr. McConnel indicated that there may be some of the original structure from EID's dam remaining on the south side of the river.

7. The 1921 EID Contract with Reclamation and the 1920 Wylie Report indicate the EID crib dam was located about six miles below Horse Shoe Bend and 22 miles above Emmett, Idaho. Horse Shoe Bend is located at about river mile 57. The Montour diversion is located about ¼ mile upstream of river mile 51. The County Line and location of the EID crib dam is located about ¼ mile down stream of river mile 52.

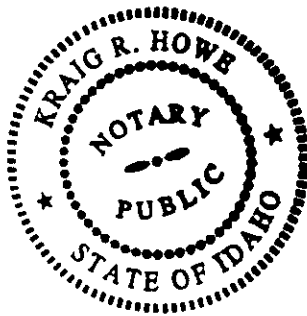
8. Based on the above information, I have determined the location of the EID
crib dam and that is was located above the diversion point for the Montour Farmers Ditch
Company.

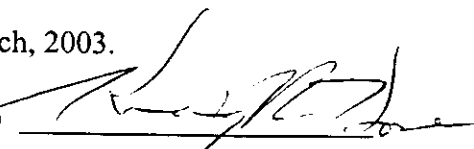
DATED this 13th Day of March, 2003.



Ruth Page
Water Rights Officer

SUBSCRIBED AND SWORN to before me this 13th Day of March, 2003.



Notary Public for Idaho 

Residing at: Bona

My Commission Expires: 1/22/08